

No. 17035

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

KENNETH EUGENE GIBBS,
RONALD CHARLES WACHS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division

FILED

SEP 12 1960

FRANK H. SCHMID, CLERK

No. 17035

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

KENNETH EUGENE GIBBS,
RONALD CHARLES WACHS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Appeal:	
Certificate of Clerk to Transcript of Record on	27
Designation of Contents of Record on.....	26
Notice of, as to Kenneth Eugene Gibbs.....	15
Notice of, as to Ronald Charles Wachs.....	16
Statement of Points on (USCA).....	35
Declaration of Howard R. Harris.....	22
Designation of Contents of Record on Appeal.....	26
Indictment	3
Judgment for Kenneth Eugene Gibbs.....	7
Judgment for Ronald Charles Wachs.....	8
Minutes of the Court Dated April 4, 1960.....	4
Minutes of the Court Dated April 5, 1960.....	4
Minutes of the Court Dated April 18, 1960.....	5
Minutes of the Court Dated May 16, 1960.....	6
Minutes of the Court Dated May 24, 1960.....	12
Minutes of the Court Dated July 20, 1960.....	23
Minutes of the Court Dated August 1, 1960.....	26
Motion for Extension of Time Within Which to File Record on Appeal, as to Kenneth Eugene Gibbs	18

Motion for Extension of Time Within Which to File Record on Appeal, as to Ronald Charles Wachs	17
Motion to Correct Sentences.....	11
Motion to Set Aside Order Extending Time With- in Which to Docket Appeal.....	21
Names and Addresses of Attorneys.....	1
Notice of Appeal as to Kenneth Eugene Gibbs.....	15
Notice of Appeal as to Ronald Charles Wachs.....	16
Notice of Motion to Correct Sentences.....	10
Order Denying Motion to Correct Sentences as to Kenneth Eugene Gibbs.....	14
Order Denying Motion to Correct Sentences as to Ronald Charles Wachs.....	13
Order Extending Time to File and Docket Record on Appeal, as to Kenneth Eugene Gibbs.....	19
Order Extending Time to File and Docket Record on Appeal, as to Ronald Charles Wachs.....	20
Points and Authorities in Opposition to Motion to Correct Sentence	11
Praeipie to Clerk, re Designation of Contents of Record on Appeal.....	24
Statement of Points on Appeal (USCA).....	35
Transcript of Proceedings.....	29

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

LAUGHLIN E. WATERS,

United States Attorney,

ELMER ENSTROM, JR.,

Assistant U. S. Attorney,

325 West "F" Street,

San Diego 1, California,

For Appellees:

HOWARD R. HARRIS,

202 Cosgrove Building,

411 Broadway,

San Diego 1, California.

In the United States District Court Southern District
of California, Southern Division

January, 1960, Grand Jury—Southern Division

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, RONALD CHARLES
WACHS, ROBERT EARL PARKIN, Defendants.

INDICTMENT

(U.S.C., Title 21, Sec. 176(a)-Illegal importation
of marihuana)

The Grand Jury charges:

On or about March 4, 1960, in San Diego County, within the Southern Division of the Southern District of California, defendants Kenneth Eugene Gibbs, Ronald Charles Wachs, and Robert Earl Parkin, with intent to defraud the United States, did knowingly import and bring into the United States from a foreign country, namely, Mexico, approximately one-half pound of bulk marihuana contrary to law, in that said marihuana had not been presented for inspection, entered, and declared as provided by United States Code, Title 19, Sections 1461, 1484 and 1485.

A TRUE BILL

/s/ [Illegible]
Foreman,

/s/ LAUGHLIN E. WATERS,
United States Attorney,

[Endorsed] Filed Mar. 30, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 4, 1960, at San Diego, California.

Present: Hon. Jacob Weinberger, District Judge;
Deputy Clerk: Hal H. Kennedy; Reporter: Malcolm E. Love; U. S. Attorney by Ass't. Atty: Elmer Enstrom, Jr.; Counsel for the Defendant: Howard Harris, for Gibbs and Wachs; Robert Becroft, for Parkin.

Defendants present in custody.

Proceedings: Arraignment and Plea, each defendant.

The defendants are duly arraigned and each enter separate pleas of Not Guilty as charged.

It is ordered that this case is referred to Judge Carter and continued until April 5, 1960, at 9:30 A.M. for Setting for Trial.

JOHN A. CHILDRESS, Clerk,
/s/ By HAL H. KENNEDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 5, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Paul Hofflund; Counsel for the Defendant: Howard Harris for Gibbs and Wachs, Robert Becroft for Parkin.

Defendants present in custody.

Proceedings: Setting.

The defendant Parkin withdraws plea of Not Guilty, and now enters a plea of Guilty.

It is ordered cause is ref. to P/O for I/R, and contd. to 4/26/60, at 10 A.M. for hearing said report and for sentence.

As to Wachs and Gibbs, it is ordered cause is set for trial for 4/26/60 at 10 A.M.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 18, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge;
Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Paul Hofflund; Counsel for the defendant: Howard R. Harris.

Defendants present on Bond.

Proceedings: Change of Plea.

Defendants each withdraw former plea of Not Guilty, and each now enters a plea of Guilty.

It is ordered cause is ref. to P/O for I/R, and continued to May 16, 1960, at 2 P.M. for hearing said report, and for sentence.

It is ordered trial date of April 26 is vacated.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 16, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge;
Deputy Clerk: William W. Luddy; Reporter: John
Swader; U. S. Attorney by Ass't Atty.: Elmer M. En-
strom, Jr.; Counsel for the Defendant: Howard R.
Harris.

Defendants present on bond.

Proceedings: Hearing report P/O and Sentence.

Court finds defendant Gibbs is 20 years of age, and
defendant Wachs is 19 years of age, and each a youth
offender. Pur to U. S. C., Title 18, Section 5010 (a),
imposition of sentence is suspended and defendants
placed on probation for a period of 5 years on usual
conditions, obey all laws, etc., comply P/O, etc., not use
or associate with known users of or dealers in narcotics
in any form, not enter Mexico, etc., and not associate
with each other.

Attorney Enstrom moves to set aside Illegal sentence,
and it is ordered said motion is denied.

It is ordered bond of each defendant is exonerated.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy

In the United States District Court Southern District
of California, Southern Division

IN No. 29215—CRIMINAL

UNITED STATES OF AMERICA,

vs.

KENNETH EUGENE GIBBS

JUDGMENT

On this 16th day of May, 1960, came the attorney for the government and the defendant appeared in person and by counsel, Howard R. Harris.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of Illegal importation of marihuana, in violation of U. S. C., Title 21, Section 176(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is twenty (20) years of age, and is a youth offender. Pursuant to U. S. C., Title 18, Section 5010 (a), imposition of sentence is suspended and defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Pro-

bation Department, that he not use or associate with known users of or dealers in any of the prohibitive pills, marihuana or narcotics in any form, that he not enter Mexico nor approach the Mexican Border without the express permission from the Probation Department, and that he not associate with co-defendant Ronald Charles Wachs.

It Is Adjudged bond of the defendant is exonerated.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed May 16, 1960.

In the United States District Court Southern District
of California, Southern Division

IN No. 29215—CRIMINAL

UNITED STATES OF AMERICA,

vs.

RONALD CHARLES WACHS.

JUDGMENT

On this 16th day of May, 1960 came the attorney for the government and the defendant appeared in person and by counsel, Howard R. Harris.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of illegal importation of marihuana, in violation of U. S. C., Title

21, Section 176(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudge that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is nineteen (19) years of age, and is a youth offender. Pursuant to U. S. C., Title 18, Section 5010 (a) imposition of sentence is suspended and defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that he not use or associate with known users of or dealers in any of the prohibitive pills, marihuana or narcotics in any form, that he not enter Mexico nor approach the Mexican Border without the express permission from the Probation Department, and that he not associate with co-defendant Kenneth Eugene Gibbs.

It Is Adjudged that bond of the defendant is exonerated.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed May 16, 1960.

In the United States District Court Southern District
of California, Southern Division

No. 29215-SD—CR.

UNITED STATES OF AMERICA, Plaintiff,
vs.

KENNETH EUGENE GIBBS,
RONALD CHARLES WACHS, Defendants.

NOTICE OF MOTION TO CORRECT
SENTENCES

To the Defendants and Attorney, Howard R. Harris, Esq.

Please take notice that on May 23, 1960, at 10:00 o'clock a.m. or as soon thereafter as the matter may be heard on the calendar of the Honorable James M. Carter, United States District Judge, in his courtroom, United States Customs House and Court House, San Diego, California, plaintiff, United States of America, will move to correct the sentences imposed by this Honorable Court on May 16, 1960.

Said motion will be supported by this notice, the motion to correct sentences, points and authorities, and records and papers on file herein.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ ELMER ENSTROM, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff,
United States of America.

[Title of District Court and Cause.]

MOTION TO CORRECT SENTENCES AND
POINTS & AUTHORITIES IN SUPPORT
THEREOF

Comes now the plaintiff, United States of America, and moves this Honorable Court to correct the sentences imposed by this Court on May 16, 1960, on the ground that the sentences thus imposed were below the mandatory minimum required to be imposed by Title 21, United States Code, Section 176(a).

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

Assistant U. S. Attorney,

Chief, Criminal Division

/s/ ELMER ENSTROM, JR.,

Assistant U. S. Attorney,

Attorneys for Plaintiff,

United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 18, 1960.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN OPPOSITION
TO MOTION TO CORRECT SENTENCE

We refer the court to the opinion of the court dated May 30, 1959 in the case of U. S. vs. Smithson and Austin, No. 27584 and U. S. vs. Feaux, No. 28036 U. S. D. C. Dist. of Calif. So. Div.

We may add that the Narcotics Control Act of 1956 is no more "repugnant" or "in conflict" with the provisions of Section 5010 (a) Title 18 U. S. C., than they are to the subsequent provisions of Section 5010. Yet, the Department of Justice finds no repugnance or conflict with respect to the later sections.

It is submitted that the motion to correct the sentences should be denied.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed May 28, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 24, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge;
Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Elmer M. Enstrom, Jr.; Counsel for the Defendant: Howard R. Harris.

Defendants not present.

Proceedings: Hearing government's motion to correct sentence.

Attorney Enstrom argues in support of motion.

It Is Ordered said motion is denied.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy.

In the United States District Court Southern District
of California, Southern Division

No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

ORDER

The defendant, Ronald Charles Wachs, in the above-entitled cause having come before the Court on May 16, 1960, for sentence, the Court having found that the defendant was nineteen years of age and would benefit from treatment under the Youth Corrections Act, imposition of sentence having been suspended and the defendant placed on probation for a period of five years, pursuant to the provisions of Title 18, Section 5010(a) of United States Code, and plaintiff, United States of America, by its counsel, having moved the Court to correct the sentence as being below the mandatory minimum required to be imposed by Title 21, Section 176(a), United States Code, and the matter having come on for hearing this 24th day of May, 1960,

It Is Hereby Ordered that said motion by the United States is denied.

Done in open Court this 24th day of May, 1960.

/s/ JAMES M. CARTER,
United States District Judge

Presented by:

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Approved: Howard R. Harris, Atty. for Deft.

[Endorsed]: Filed May 24, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 292-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

NOTICE OF APPEAL TO THE COURT
OF APPEALS

Notice is hereby given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of conviction and order suspending imposition of sentence and placing defendant on probation, dated May 16, 1960, and entered May 20, 1960, and from the order denying motion of plaintiff to correct sentence dated May 24, 1960, and entered May 26, 1960.

LAUGHLIN E. WATERS,

United States Attorney,

/s/ ELMER ENSTROM, JR.,

Assistant United States Attorney

Dated: June 3, 1960, San Diego, California.

[Endorsed]: Filed June 3, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

NOTICE OF APPEAL TO THE COURT
OF APPEALS

Notice is hereby given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of conviction and order suspending imposition of sentence and placing defendant on probation, dated May 16, 1960, and entered May 20, 1960, and from the order denying motion of plaintiff to correct sentence dated May 24, 1960, and entered May 26, 1960.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Dated: June 3, 1960, San Diego, California.

[Endorsed]: Filed June 3, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

MOTION FOR EXTENSION OF TIME WITHIN
WHICH TO FILE RECORD ON APPEAL.

Comes now the United States, by its attorneys, and respectfully moves this Court for an extension of time within which to file the record on appeal until September 1, 1960, ninety days from the date of filing the first notice of appeal, for the reasons hereinafter set forth.

The appeal in the case of *United States v. Helen Mae Lane*, No. 16874, Court of Appeals for the Ninth Circuit, and *United States v. Honorable Fred Kunzel*, Petition for a Writ of Mandamus, Court of Appeals for the Ninth Circuit, involves issues identical to those presented by the instant case, and a decision in *Lane-Kunzel* would probably also dispose of the instant appeal. Accordingly, both the United States and the defendant would save time, effort, and expense if action on this appeal were delayed until a decision is reached in *Lane-Kunzel*.

Wherefore, it is respectfully requested that the time for filing the record herein be extended to September 1, 1960.

/s/ LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Dated: July 8, 1960.

[Endorsed]: Filed July 8, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

MOTION FOR EXTENSION OF TIME WITHIN
WHICH TO FILE RECORD ON APPEAL

Comes now the United States, by its attorneys, and respectfully moves this Court for an extension of time within which to file the record on appeal until September 1, 1960, ninety days from the date of filing the first notice of appeal, for the reasons hereinafter set forth.

The appeal in the case of *United States v. Helen Mae Lane*, No. 16874, Court of Appeals for the Ninth Circuit, and *United States v. Honorable Fred Kunzel*, Petition for a Writ of Mandamus, Court of Appeals for the Ninth Circuit, involves issues identical to those presented by the instant case, and a decision in *Lane-Kunzel* would probably also dispose of the instant appeal. Accordingly, both the United States and the de-

fendant would save time, effort, and expense if action on this appeal were delayed until a decision is reached in Lane-Kunzel.

Wherefore, it is respectfully requested that the time for filing the record herein be extended to September 1, 1960.

/s/ LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Dated: July 8, 1960.

[Endorsed]: Filed July 8, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 29215-SC Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

ORDER

Upon consideration of the motion of the United States of America for an extension of time within which to file the record on appeal herein, good cause appearing therefor,

It Is Hereby Ordered: That the time for filing the record on appeal herein is extended to and including September 1, 1960.

Dated this 11th day of July, 1960.

/s/ JACOB WEINBERGER,
United States District Judge

[Endorsed]: Filed July 11, 1960.

In the United States District Court Southern District
of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

ORDER

Upon consideration of the motion of the United States of America for an extension of time within which to file the record on appeal herein, good cause appearing therefor,

It Is Hereby Ordered: That the time for filing the record on appeal herein is extended to an including September 1, 1960.

Dated this 11th day of July, 1960.

/s/ JACOB WEINBERGER,
United States District Judge

[Endorsed]: Filed July 11, 1960.

In the United States District Court Southern District
of California, Southern Division

No 2921-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS and
KENNETH EUGENE GIBBS, Defendants.

MOTION TO SET ASIDE ORDER EXTENDING
TIME WITHIN WHICH TO DOCKET AP-
PEAL

Defendants, Ronald Charles Wachs and Kenneth Eugene Gibbs respectfully move the above entitled Court may have to docket its appeal to September 1, 1960.

Notice of Appeal, by Appellant United States of America, was filed on June 3, 1960. Appellant has not proceeded, under Rule 75, Federal Rules of Civil Procedure, promptly to designate the portions of the record which it desires the Court of Appeals to consider with reference to the Appeal. The purpose of the extension was not to allow the Court Reporter or the Clerk to properly prepare the record. On the contrary, the purpose was merely delay.

The delay was for the purpose of preventing Appellees from being heard in this matter so important to their future well being.

The record itself consists merely of the Indictment, the Judgment of Conviction and the Order with respect to the sentence. Thus, the expense involved is minimal. Appellees desire the right to be heard in the Court of Appeals and failure in this request would be a denial

of due process. Appellees therefore ask the Court to set aside its order extending time within which Appellants may docket their appeal.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed July 13, 1960.

[Title of District Court and Cause.]

DECLARATION OF HOWARD R. HARRIS

I, Howard R. Harris, state:

That I am the Attorney of Record for defendants, Ronald Charles Wachs and Kenneth Eugene Gibbs. That the Court signed an Order Ex-Parte extending time within which to docket the appeal in the above matter. That concurrently herewith, appellee is filing a motion to set aside such order. That time is of the essence, in that a delay of time will destroy defendant's right to be heard on appeal in this matter.

That I am due to appear in the United States District Court, Southern District of California, Southern Division, on Tuesday, July 19, 1960, on a matter on which I was appointed. I believe it will save the time of the Court, as well as of Counsel, to hear the matters at the same time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 13th day of July, at San Diego, California.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed July 13, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: July 20, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge;
Deputy Clerk: William W. Luddy; Reporter: John
Swader; U. S. Attorney by Ass't Atty.: Elmer M. En-
strom, Jr.; Counsel for the defendant: Howard Har-
ris.

Defendants not present.

Proceedings: Hearing defendants' motion to set
aside order extending time within which to docket
appeal.

Attorney Enstrom argues in opposition to said mo-
tion.

It Is Ordered said motion is granted, the order ex-
tending time to docket appeal to September 1, 1960,
is modified and Government is granted to August 1,
1960 in which to docket record on appeal.

JOHN A. CHILDRESS, Clerk
By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

PRAECIPE TO CLERK, UNITED STATES DIS-
TRICT COURT, RE DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Pursuant to the designation of contents of record on
appeal under Rule 75 of the Federal Rules of Civil
Procedure filed July 21, 1960, by Appellant United
States of America, you are hereby requested to forward

said record to the Court of Appeals forthwith, making certain that the following are contained in the said record on appeal in the above-entitled matter:

1. The Indictment filed March 30, 1960.

2. Minutes of the United States District Court, including those dated as follows:

(a) Minutes dated April 4, 1960, regarding arraignment and plea of Kenneth Eugene Gibbs and Ronald Charles Wachs;

(b) Minutes dated April 5, 1960, regarding setting as to Kenneth Eugene Gibbs and Ronald Charles Wachs;

(c) Minutes dated April 18, 1960, regarding plea of guilty by Kenneth Eugene Gibbs and Ronald Charles Wachs;

(d) Minutes dated May 16, 1960, regarding judgment and order suspending imposition of sentence of Kenneth Eugene Gibbs and Ronald Charles Wachs.

(e) Minutes dated May 24, 1960, regarding hearing on motion of the United States to correct sentences.

3. The reporter's transcript of proceedings as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, on the following date: May 16, 1960, re hearing regarding judgment and order suspending imposition of sentence of Kenneth Eugene Gibbs and Ronald Charles Wachs.

4. The judgments of conviction and orders suspending imposition of sentences and placing Kenneth Eugene Gibbs and Ronald Charles Wachs on probation, filed May 16, 1960.

5. The notice of motions of the United States to correct sentences as to Kenneth Eugene Gibbs and Ron-

ald Charles Wachs; Motion to correct sentences and points and authorities in support thereof, filed May 18, 1960.

6. The orders denying motion of the United States to correct sentences of Kenneth Eugene Gibbs and Ronald Charles Wachs filed May 24, 1960.

7. The notices of appeal of the United States as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, filed June 3, 1960.

8. Orders extending time for Appellant to file record on appeal as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, to and including September 1, 1960, filed July 11, 1960.

9. Minute order dated July 20, 1960, modifying orders filed July 11, 1960, to extent that the time for filing the record on appeal herein is extended to and including August 1, 1960, instead of September 1, 1960, as to Appellees, Kenneth Eugene Gibbs and Ronald Charles Wachs.

Dated: July 21, 1960.

LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 21, 1960.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk, United States District Court, Southern
District of California:

Pursuant to Rule 75 of the Federal Rules of Civil
Procedure, Appellant, United States of America, here-
by designates that the complete record and all of the
proceedings in the above cause as to Appellees, Ken-
neth Eugene Gibbs and Ronald Charles Wachs, be con-
tained in the record on appeal in the above matter.

Dated: July 21, 1960.

LAUGHLIN E. WATERS,
United States Attorney
/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 21, 1960.



[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: August 1, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge;
Deputy Clerk: William W. Luddy; Reporter: None
Appearing; U. S. Attorney by Ass't Atty.: None Ap-
pearing; Counsel for the Defendant: None Appearing.

Defendants are not present.

Proceedings: It Is Ordered that time for Docketing
Record on Appeal be, and it hereby is, extended for a
period of five days from today.

JOHN A. CHILDRESS, Clerk
By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

PAGE:

- 1 Names and Addresses of Attorneys.
- 2 Indictment, filed 3/30/60.
- 3 Minute Order 4/4/60 re arraignment and plea of defendants.
- 4 Minute Order 4/5/60 re setting.
- 5 Minute Order 4/18/60 re change of plea.
- 6 Minute Order 5/16/60 re sentence.
- 7 Judgment for Kenneth Eugene Gibbs, filed 5/16/60.
- 8 Judgment for Ronald Charles Wachs, filed 5/16/60.
- 9 Plaintiff's Notice of Motion to Correct Sentences and Motion to correct sentences, etc., filed 5/18/60.
- 17 Defendants' Points and Authorities in opposition to motion to correct sentences, filed 5/28/60.
- 18 Minute Order 5/24/60 re hearing on motion to correct sentences.
- 19 Order denying motion to correct sentences as to Ronald Charles Wachs, filed 5/24/60.
- 20 Order denying motion to correct sentence as to Kenneth Eugene Gibbs, filed 5/24/60.
- 21 Notice of Appeal filed 6/3/60 by Plaintiff from judgment as to Kenneth Eugene Gibbs.

- 22 Notice of Appeal filed 6/3/60 by Plaintiff from judgment as to Ronald Charles Wachs.
- 23 Plaintiff's motion for extension of time within which to file record on appeal, filed 7/8/60 (2 motions).
- 27 Order extending time to file and docket record on appeal, filed 7/11/60 (2 orders).
- 29 Motion to set aside order extending time within which to docket appeal, filed 7/13/60.
- 31 Declaration of Howard R. Harris, filed 7/13/60.
- 32 (copy) Minute Order 7/20/60 re hearing on motion to set aside order extending time to docket appeal.
- 33 Praecipe to Clerk, re Designation of contents of record on appeal, filed 7/21/60.
- 36 Designation of contents of record on appeal, filed 7/21/60.
- 38 (copy) Minute Order 8/1/60 extending time to docket record on appeal period of five days from date.
- (Copy) One volume Reporter's Transcript of Proceedings had on: May 16, 1960.

Dated: August 4, 1960.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ BY WM. A. WHITE,
Deputy Clerk.

In the United States District Court Southern District
of California, Southern Division

No. 29215-SD-C

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS and RONALD
CHARLES WACHS, Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California

May 16, 1960

Before Honorable James M. Carter, Judge Presid-
ing

Appearances: For the Plaintiff: Elmer M. Enstrom,
Jr., Esq., Assistant United States Attorney;

For the Defendant: Howard R. Harris, Esq., [1]*

Monday, May 16, 1960, 2:00 P.M.

(Other Matters)

The Clerk: 24-29215 Criminal, United States of
America, Plaintiff, v. Kenneth Eugene Gibbs and Ron-
ald Charles Wachs, Defendants.

Hearing Report of Probation Officer and sentence.

The Court: Have you seen the Probation Report,
Mr. Harris?

Mr. Harris: Yes, I have, your Honor.

The Court: Does the Government have a recom-
mendation in these cases?

* Page numbers appearing at bottom of page of Original Tran-
script of Record.

Mr. Enstrom: We concur in the Probation Officers Reports.

The Court: Mr. Harris, what do you or the defendants have to say before sentence is imposed?

Mr. Harris: Your Honor, first I would like to talk about Ron Wachs, who is standing next to me. Ron is from Paso Robles, California. His family has lived there all his life. Mr. and Mrs. Wachs are in Court. They are what we would consider a good family. Ron was graduated from High School. He has never been in any trouble. He is not known to the Police up there as running in any Juvenile Gang or as a person whom they have suspected for a long time but just haven't caught. Ron's sister is going to the University of California and is a Senior, and his younger sister is married and is working for the Phone Company.

Yet Ron got into this trouble, whatever the reason. I [2] think he was frank with the Probation Officer. He told them what had happened. He told them that he had fooled around with marihuana before.

That is the situation with Ron Wachs.

Ken Gibbs is the red-headed young man standing on the outside here. His situation was a little different, from his back-ground. His grandmother, Mrs. Macy, has raised him, and she is present here. His older brother is in Service. Ken, of course, didn't have a mother and father to watch out for him, but his grandmother has done the job. He hasn't been in any real trouble until this time. He did not finish his Senior year in High School. Other than this present trouble he has kept his nose clean. He also was not known to the Police up in Paso Robles.

These boys have gotten into this trouble now with respect to marihuana. It is the old business of coming down to Tijuana, buying some marihuana from a taxi-driver, and getting caught with it at the border.

I may say about Kenn Gibbs that he has been employed and that his employers all had a good word to say about him. If he would be sentenced under Section 5010(a) he would be able to get a job in the Paso Robles area as a Clerk or in other ways. He has worked previously. He has inquired of his prior boss, and his boss appears willing to take him back.

Ron Wachs has worked on his father's farm. He has done [3] farm work. He has run tractors and done minor repairs on tractors and other work of that nature, and he has a job if he would be sentenced under Section 5010(a).

I may mention that within the last week—I just learned about it today—Ron Wachs married his girlfriend up in the Paso Robles area. As I say this is something very current and just happened during the last week. So now he has added responsibilities.

I know that the Department of Justice does not believe that the Court has the jurisdiction to grant sentence under Section 5010(a), under this type of charge. However, I know that the Court has done it in the past and might consider it in the future in the appropriate case. I submit to your Honor that this appears to be a proper or appropriate case. These aren't boys who have been continually in trouble or have been on the edge of the law for years and years—I say years and years, speaking comparatively—for 2, 3 or 4 years, since they have been in the position where they could

get in trouble. These are boys who evidently got into some bad company. They have certainly learned their lesson, and I think that in this case, institutional treatment is not needed. I ask the Court to sentence them under Section 5010(a).

Mr. Enstrom: Your Honor, the Government stated that it concurred in the recommendation of the Probation Officer. It was, of course, with the understanding that the recommendation [4] was that the defendants be sentenced under Section 5010(b). We, of course, oppose a sentence under Section 5010(a) on the ground that such sentence would be an illegal sentence.

The Court: What happened to the Parkin case?

Mr. Enstrom: That defendant was sentenced under Section 5010(a), your Honor.

The Court: Did I sentence him, or did Judge Weinberger?

Mr. Enstrom: You sentenced him, according to my records, on April 29th.

The Court: How old was he?

Mr. Harris: I think he was 21, and there was some evidence of prior narcotic activity as far as he was concerned, that is my understanding.

The Court: What ever I do, it is probably a good thing that these boys were arrested when they were, because they started on the primrose path that leads to addiction to heroin. They start with pills, and then graduate to marihuana, and then to heroin, and then you're really hooked.

I am of the view that the Court has authority under Section 5010(a) to place a Youth Offender under the age of 21 on Probation. I think with these boys' prior records such a sentence is indicated.

As I understand the Act, though, you get only one bite at the apple. That is, you get only one bite at the Youth Corrections Act. If you violate Probation, then you are [5] sentenced as an adult and get from 5 to 20 years. Whereas, if you are sentenced at this time under sub-division (b) you would get an indeterminate sentence which could not run more than 4 years incarceration.

Are you willing to take that gamble? If you violate Probation and come back here, then you get 5 to 20 years and you can't talk about being a Youth Offender any more. You get only one chance at the Act.

The Court sentences under Section 5010(a). It is the judgment of the Court as to each defendant that imposition of sentence is suspended and each defendant is placed on Probation under Section 5010(a).

The conditions of Probation are that defendants obey local, State and Federal law; that they comply with the Regulations of the Probation Department; that they not use any of the prohibited pills, marihuana or heroin; that they not associate with persons who are addicted to or use any of these substances or deal in them; that they not associate with one another; and that they not go to Mexico or anywhere near the Mexican border without express permission of their Probation Officer. The period of Probation is 5 years.

Mr. Enstrom: At this time, your Honor, I move for the record to set aside the sentence as to each defendant, under the Federal Rules, on the ground that it is an illegal sentence.

The Court: Motion denied. [6]

Mr. Harris: May bond be exonerated, your Honor?

The Court: Bond will be exonerated.

I want to see the defendants with their parents after Court.

The sentence will also contain a finding that defendant Wachs is 19 years of age and that defendant Gibbs is 20 years of age, and that they are both suitable for treatment under the Youth Corrections Act.

(Other matters.) [7]

[Certificate of Court Reporter attached.]

[Endorsed]: Filed July 29, 1960.

[Endorsed]: No. 17035. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Kenneth Eugene Gibbs, Ronald Charles Wachs, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: August 5, 1960.

Docketed: August 10, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In The United States Court of Appeals
for the Ninth Circuit

No. 17035

UNITED STATES, Appellant,
vs.
KENNETH EUGENE GIBBS and RONALD
CHARLES WACHS, Appellees.

STATEMENT OF POINTS ON APPEAL

Comes now the United States by its attorneys and states that the following points will be urged in support of this appeal:

1. Jurisdiction of this appeal in this Court is sought under 28 U.S.C. 1291. *United States v. Cook*, 19 F. 2d 826 (5th Cir., 1927), *aff'd. sub nom, United States v. Murray*, 275 U.S. 347 (1928); *United States v. Albrecht*, 25 F. 2d 93 (7th Cir., 1928); *United States v. La Shagway*, 95 F. 2d 200 (9th Cir., 1938).

2. Appellees were convicted of a violation of 21 U.S.C. 176(a), and placed on probation. Under 26 U.S.C. 7237(d) the Court had no power to grant probation to a defendant convicted of a violation of 21 U.S.C. 176(a).

3. Offenders between the ages of 18 and 22 are not exempt from the prohibition of 26 U.S.C. 7237(d).

4. The Youth Corrections Division of the Bureau of Prisons is not authorized to supervise probation. It was created for the purpose of administering other types of treatment.

5. No grant of probation is authorized by the Youth Corrections Act (18 U.S.C. 5010(a)). The only probation available to youth offenders is that under 18 U.S.C. 3651, and the provisions of that section do not apply where 26 U.S.C. 7237(d) prohibits the grant of probation.

6. Even if the Youth Corrections Act provided the courts with power to place a defendant on probation, such power did not survive the enactment of 26 U.S.C. 7237(d).

7. The legislative histories of both the Narcotics Act and the Youth Corrections Act compel the conclusion that probation could not be granted to the defendants in this case and that the action of the District Court granting probation was unauthorized and illegal.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 20, 1960. Frank H. Schmid, Clerk.
